IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20308/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2016	**On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR DALWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel instructed by Maliks and Khan Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Judge Ferguson dated 23 February 2015 in which the Judge dismissed an appeal against refusal of entry clearance to the Appellant, who had applied for entry clearance to join his wife, Mrs Indu Sharma, a British national.

2. The Entry Clearance Officer refused that application for a number of reasons. Firstly it was asserted that during an interview in support of that application conducted on 6 August 2013 the Appellant had made a false

statement when asked whether he had ever used any different identity or date of birth. He had at first asserted that he had never done so but later in that interview, and it is not any longer disputed, he accepted that he had used a different date of birth in the United Kingdom when he was here at an earlier stage when he used a driving licence issued by the DVLA in a different date of birth. The Entry Clearance Officer held that this was a false statement indicating that the Appellant failed to meet the suitability requirements set out in paragraph S-EC.2.2.(a) of Appendix FM.

3. The Entry Clearance Officer also invoked Immigration Rule 320(11), which provides that:

> "In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2 - 8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply:
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> …
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> **Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**
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> …
>
> (11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
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> (i) overstaying; or
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> (ii) breaching a condition attached to his leave; or
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> (iii) being an illegal entrant; or
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> (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not); and there are other aggravating circumstances, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process."

4. The Entry Clearance Officer invoked that discretionary ground for refusing entry clearance on the basis that it was asserted that the Appellant had engaged in activity meeting the definition of contriving in a significant way to frustrate the intentions of the Immigration Rules and that there were aggravating circumstances.

5. Those matters are that the Appellant entered the United Kingdom in 2000 on a visit visa but did not return to India. He ultimately left the United Kingdom voluntarily on 19 December 2011. However, during his extensive period of overstaying the Entry Clearance Officer records that he was encountered in 2006, 2008, 2009 and 2011 and served with papers as an overstayer. It was observed that he had lodged an appeal against a

decision to remove him in 2006 on human rights grounds and that this appeal was dismissed.

6. It was said that when the Appellant was encountered on the second occasion he was released with reporting conditions and removal directions were set for his return to India but the Appellant admitted in an interview with the entry Clearance Officer on 6 August 2013 that he did not attend the airport to take that flight. It was also asserted that Home Office records noted that in 2009 he was again encountered and absconded. It was observed that in interview the Appellant admitted that he stopped reporting because he thought that he would be deported back to India.

7. The Entry Clearance Officer also recorded that the Appellant presented himself to the authorities in early 2011 stating that he wished to voluntarily return to India. However, he then asked representatives to issue a judicial review objecting to his removal from the United Kingdom. The Appellant ultimately did voluntarily depart on 19 December 2011. The Appellant had also obtained medical treatment during his time in the United Kingdom. In summary, the Entry Clearance Officer relied upon the Appellant's use of different identities, working in breach of conditions, seeking medical treatment, failing to comply with reporting conditions of temporary admission, absconding and obstructing removal and failing to comply with removal directions in order to justify the Entry Clearance Officer's view that the Appellant had previously contrived in a significant way to frustrate the intentions of the Immigration Rules.

8. The Entry Clearance Officer also addressed his mind as to whether the applicant satisfied the relevant Immigration Rules. Entry clearance was refused under Appendix FM under the route of entry clearance as a partner on the basis that the Entry Clearance Officer was not satisfied that the Appellant would be adequately maintained and accommodated. The financial eligibility criteria were not relevant in this application because the Appellant's wife, Mrs Sharma, is in receipt of disability living allowance. However, it remains a condition of such an applicant that they must still be adequately maintained and accommodated. That issue was ultimately successfully held in his favour during the appeal before the Judge. It was observed, however, that the Appellant did not have a relevant English language certificate in support of his application for leave to remain under Appendix FM.

9. The Appellant appealed, that appeal being heard at Birmingham on 2 February 2015. Mrs Sharma, the Sponsor, gave evidence in support of the appeal. There was a very considerable volume of documentation before the Judge. My attention has been brought to the essential elements of that documentation.

10. The Judge held that as a result of the Appellant's immigration history the Entry Clearance Officer's decision to invoke paragraph 320(11) was appropriate but the Judge also considered the Appellant's exclusion from the United Kingdom under Article 8 ECHR and held that it was

proportionate to continue to refuse entry clearance. The Appellant sought permission to appeal against that decision in grounds originally drafted on 22 March 2015 but permission was refused by Judge Saffer on 7 May 2015. Renewed grounds of appeal were drafted to the Upper Tribunal in which the original grounds were not adopted but a distinct series of arguments were advanced in grounds dated 11 June 2015. Permission to appeal was granted by Judge Goldstein on 18 August 2015.

11. I have heard legal argument from Mr Fripp on behalf of the Appellant today. I have not found it necessary to ask for the assistance of Ms Everett by way of response from the Respondent. The grounds of appeal challenging the First-tier decision are as follows. The first ground is in summary that in invoking the provision of paragraph 320(11) of the Immigration Rules the Secretary of State and in turn the First-tier Judge erred in law in failing to acknowledge and to consider the possible permanent exclusion that might result from that provision being invoked. Mr Fripp invited me to consider the period of time that has passed since the relevant behaviour of the Appellant, raised by the Entry Clearance Officer. Those acts span a number of years from 2000.

12. The parties agreed that the aggravating behaviour that lasted for the period of the Appellant's absconding from 2009 to early 2011 ceased when he brought himself to the attention of the immigration authorities. It is argued that the period of time between that point in time, early 2011, and the date of the decision being 8 October 2013 and therefore a period in excess of eighteen months is a period of time which the Immigration Judge should have had specific regard to and should have at least considered whether that passage of time resulted in it no longer being appropriate for the Entry Clearance Officer to seek to rely upon paragraph 320(11).

13. The Judge, I find, was fully aware of the chronology of the behaviour of the Appellant complained of by the Entry Clearance Officer. The Judge also consciously excluded the Appellant's act of bringing a legal challenge to his proposed removal in the middle period of 2011 as amounting to aggravating behaviour making a finding at the end of paragraph 26 that such action did not amount to vexatious behaviour.

14. When considering this ground of appeal I consider it appropriate to consider alongside the Appellant's third ground of appeal, which relates to the application of the reported case of PS (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC). That was an appeal heard by the Upper Tribunal in relation to an Appellant who had been refused entry clearance by an Entry Clearance Officer on the basis that he had overstayed previously in the United Kingdom and who was suspected of having worked unlawfully in the United Kingdom. In allowing that Appellant's appeal the Upper Tribunal held that those actions did not amount to behaviour as set out in paragraph 320(11) and gave the following advice in its head note:

> "In exercising discretion under paragraph 320(11) of HC 395, as amended, to refuse an application for entry clearance in a case where the automatic prohibition on the grant of entry clearance in paragraph 320(7B) is disapplied by paragraph 320(7C), the decision maker must exercise great care in assessing the aggravating circumstances said to justify refusal and must have regard to the public interest in encouraging those unlawfully in the United Kingdom to leave and seek to regularise their status by an application for entry clearance."

15. It is apparent from the Judge's decision that the provisions of PS were brought to his attention (see paragraph 17). I find that the potential problem that Mr Fripp identifies by invocation of paragraph 320(11), that is the potential permanent exclusion of an applicant for entry clearance, is the subject of the advice given in PS. That judgment provides caution about over-liberal application of that provision, particularly for persons such as the present applicant, who has applied under Appendix FM and is therefore not excluded by operation of 320(7A) or (7B).

16. I do not find that there is any material misdirection in law or failure to take into account a material consideration by the Immigration Judge in upholding the Entry Clearance Officer's reliance upon 320(11) in the present case, even taking into account the period of time that Mr Fripp refers me to being early 2011 until 8 October 2013 as representing the period of time that the Appellant has been excluded from the United Kingdom.

17. I further note that early 2011 would in any event be an inappropriate point in time to declare the applicant as last having contrived in a significant way to frustrate the intentions of the Rules or engaged in other aggravating behaviour because, as I have mentioned, the Entry Clearance Officer invoked paragraph S-EC.2.2.(a) of Appendix FM, which is a discretionary power now built into Appendix FM to refuse entry clearance on the basis of suitability. The Entry Clearance Officer had done this on the basis that the Appellant had made a false representation in the course of the present application for entry clearance.

18. The Judge was aware that that was one of the grounds that the Entry Clearance Officer had relied upon as it is referred to at paragraph 13 of the decision. It is right to acknowledge that the Judge does not appear to rely upon that false representation in his conclusion on the proportionality issue towards the end of his decision. However, given that the applicant appeared at the end of his interview with the Entry Clearance Officer on 6 August 2013 to accept that he had previously used a false date of birth, this also amounts to an acceptance that his assertion at the beginning of that same interview that he had not done so was false.

19. If I had been in any way persuaded by Mr Fripp's submission that the period of time between early 2011 and 8 October 2013 was a specific consideration which the Immigration Judge had failed to have regard to in upholding the Entry Clearance Officer's invocation of paragraph 320(11), and if it had been necessary for me to set aside this decision, then I would

have been obliged in remaking the decision to have regard to what I find to be the last act of aggravating behaviour employed by the Appellant, that being the Appellant's false representation on 6 August 2013, in the application process for his present application. That factor would have strongly militated against the applicant in any challenge to the invocation of paragraph 320(11). I find that ground 1 of the Appellant's grounds of appeal does not disclose any material error of law.

20. The second ground relied upon by the Appellant is that the Judge erred in law in treating the weight to be attached to the family life enjoyed between the Appellant and his wife as having little weight. It appears to be accepted by the Appellant that the Judge was obliged by operation of Section 117B(4) Nationality, Immigration and Asylum Act 2002, to attach little weight to the family life that was formed between the Appellant and his wife whilst the Appellant was in the United Kingdom unlawfully. Mr Fripp seeks to draw a distinction between the weight to be attached to that period of family life and the weight to be attached to the continued family life enjoyed between the Appellant and his wife since the Appellant's departure from the United Kingdom. Indeed since the Appellant's departure Mrs Sharma travelled to India in 2012, which was the point in time in which the couple actually married.

21. Mr Fripp argues that in failing to attach greater weight than 'little weight' to that additional period of family life as between the couple, the Judge errs in law. Respectfully I disagree with Mr Fripp in that regard. It does not seem to follow that greater weight deserves to be attached to a family life that is pursued after the departure of one party to the couple from the United Kingdom compared with the weight that is to be attached to the family life enjoyed by the couple whilst in the United Kingdom. The Appellant departed the United Kingdom in 2011 in the knowledge that his immigration status was highly precarious.

22. Mrs Sharma must also inevitably have been aware of that. In the light of that the parties still in 2012 resolved to marry. They both therefore would have been aware that the issue of whether the Appellant would be ever permitted to enter the United Kingdom was something that was very much in question. I do not find that it logically follows that the period of their family life following the Appellant's departure is deserving of greater weight than the period of family life which was enjoyed within the United Kingdom and I disagree with the Appellant's second ground.

23. The third ground of appeal is that, if I summarise it correctly, inadequate consideration has been given by the Judge as to the proposition of law articulated in the head note of the reported case of PS India. I have already set this out in my consideration of the Appellant's first ground. I had also mentioned that I thought that the first and third grounds were connected with each other. I rely upon my observations in response to the Appellant's first ground and I do not find that the Immigration Judge either misdirected himself in law or failed to take into account the advice provided by the Upper Tribunal in the case of PS.

24. It cannot properly be said in my view that the Judge in the present appeal did not proceed with care in reviewing the Entry Clearance Officer's invocation of paragraph 320(11). The Judge's decision is detailed and sets out in some detail the extent of the Appellant's poor immigration history and provides adequate reason for his decision, which was that it remained appropriate for the Appellant to be refused entry clearance under paragraph 320(11).

25. The final ground of appeal is in relation to the medical problems experienced by the Appellant's wife, Mrs Sharma. Mrs Sharma is a woman who does not enjoy good health and that was known to the Immigration Judge. He referred to her health problems at paragraphs 36 and 37. As I understand the Appellant's ground, it is that the medical evidence that was before the Judge should have been taken into account for the purposes of determining any adverse effect on Mrs Sharma resulting from the continued exclusion of the Appellant from the United Kingdom. The Judge considered the medical evidence in the following way:

> "36. Evidence of Mrs Sharma's medical records is contained in her statement and in the medical evidence contained in the bundles. The GP report at page 1029 from 15 August 2014 describes that she is 'receiving treatment through psychology department and on drug therapy for depression. She is known to suffer with depression for fairly long time. At present she receives counselling for this weekly.' The GP letter from 19 February 2013 states that the depression dates back to 2006. The August 2014 letter also confirms that she suffers from type 2 diabetes, asthma, lower back pain and a painful right knee following a knee replacement operation in 2011. She is on medication set out at page 1030. These medical issues entitle her to disability living allowance with a care component at the lower level and a mobility component at the higher level.
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> 37. The medical evidence showed that Mrs Sharma had been diagnosed with depression from as long ago as 2006, covering the time that she was in a relationship with Mr Singh and living with him in the United Kingdom. Although her statement conveys her hope that her health would improve if Mr Singh joined her in the United Kingdom (paragraph 34) and her doctor is of the opinion that she needs physical and psychological support from her family (page 1030) her history does not suggest that the two issues are as closely linked as she suggests nor does the evidence establish that she cannot maintain family life in India with her husband if that is as important to her as she claims. She may prefer to remain in the United Kingdom but the couple married in the knowledge that they may not be able to reside together in the United Kingdom unless they meet the requirements of the Immigration Rules and contrary to her evidence both their families are now 'going out their way to help' them as a couple."

26. It seems to me apparent from that passage that the Judge had fully appraised himself of the medical evidence relevant to Mrs Sharma. I have also had my attention drawn to the text of the GP letter of 15 August 2014. It is right to acknowledge, I believe, that there is nothing contained within it which specifically says that the Appellant's presence in the United

Kingdom is necessary for the wellbeing of Mrs Sharma. I do not find that there is any relevant element of that evidence which the Judge has failed to take into account for any purpose. The finding that the evidence does not establish that she cannot maintain family life in India with her husband is one which was open to the Judge on the evidence.

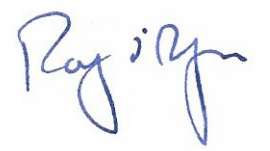
Notice of Decision

27. In conclusion I find that the Appellant's grounds of appeal do not disclose any material error of law within the Judge's decision.

28. I make no comment as to what the prospects may be of the Appellant succeeding in any further application for entry clearance, but I do note that if I am right that the last occasion when the Appellant is recorded as having engaged in aggravating behaviour was his interview of 6 August 2013, then that is now approaching some two and a half years ago; a relatively long period of time. That period of time may be something which the applicant can make reference to if he chooses to make any further application for entry clearance.

No anonymity direction is made.

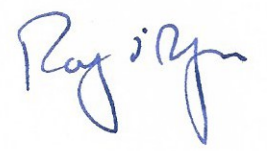
Signed Date 27.1.16



Deputy Upper Tribunal Judge O'Ryan

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 27.1.16



Deputy Upper Tribunal Judge O'Ryan